IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-297

MANCHESTER NEWS COMPANY, INC.,
APPELLANT,

V.

STATE OF NEW HAMPSHIRE,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

The State of New Hampshire

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The Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Hampshire on the ground that it is manifest that the questions on which the decision of the case depends are so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND
THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of New Hampshire Revised Statutes Annotated (RSA) 650, "Obscene Matter" (Supp. 1976).

This statute provides in pertinent part as follows:

> 650:1, II. "'Knowledge' means general awareness of the nature of the content of the material."
>
> 650:1, IV. "Material is 'obscene' if, considered as a whole, to the average person
> (a) when applying the contemporary standards of the county within which the obscenity offense was committed, its predominant appeal is to the prurient interest in sex, that is, an interest in lewdness or lascivious thoughts;
> (b) it depicts or describes sexual conduct in a manner so explicit as to be patently offensive; and
> (c) it lacks serious literary, artistic, political or scientific value."
>
> 650:1, VI. "'Sexual Conduct' means human masturbation, sexual

> intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted."

The portion of 650:1, VI that states "or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female" was excised from the statute by the New Hampshire Supreme Court in the decision below so that the statute now provides:

> "'Sexual Conduct' means human masturbation, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation

> or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted."

650:2, I: Offenses.

> "I. A person is guilty of a misdemeanor if he commits obscenity when with knowledge of the nature of content thereof, he:
>
> (a) sells, delivers or provides, or offers or agrees to sell, deliver or provide, any obscene material; or
>
> (b) presents or directs an obscene play, dance or performance, or participates in that portion thereof which makes it obscene; or
>
> (c) publishes, exhibits or otherwise makes available any obscene material; or
>
> (d) possesses any obscene material for purposes of sale or other commercial dissemination; or
>
> (e) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene."

B. The Proceedings Below

Appellant was indicted for delivering certain obscene material to a New Hampshire retailer in violation of N.H. RSA 650 (Supp. 1976). The indictment charged

that on or about the 10th day of June, 1976, the Appellant "did purposely deliver obscene material to Luv Pharmacy, Inc., in that the said defendant did distribute the July 1976 issue of Penthouse Magazine to the said Luv Pharmacy, Inc., the defendant being a corporation." The indictment was entered at the September 1976 Term of the Hillsborough County Superior Court. At a pretrial hearing, the Superior Court denied Appellant's challenge to the constitutionality of the indictment and the statute under which it was brought. At the same hearing, the Court allowed the State to substitute an information for the indictment. The information contained the same language as the indictment with the addition of " . . . with knowledge of the nature of the contents thereof, contrary to RSA 650:2." (The information is attached hereto as Appendix B).

The Trial Court reserved and transferred to the New Hampshire Supreme Court all

questions of law raised by the pleadings, rulings and exceptions granted thereto.

In State v. Manchester News Company, Inc., 118 N.H. ____ (decided April 25, 1978) (attached hereto as Appendix A), the New Hampshire Supreme Court ruled the New Hampshire obscenity statute constitutional while excising a certain portion of the statutory definition of proscribed sexual conduct. Further, the Court found that the information brought against the Appellant provided it with sufficient notice of the charge against it. The case was remanded for further proceedings consistent with the Court's construction of N.H. RSA 650. Appellant's motion for a rehearing was denied by the New Hampshire Supreme Court, and Appellant now seeks on appeal a pretrial ruling by this Court on the constitutionality of the New Hampshire obscenity statute and the sufficiency of the information against the Appellant.

QUESTIONS PRESENTED

I. Whether this Court lacks jurisdiction where the Court below ruled on Appellant's appeal in advance of a criminal trial and ordered that the case be remanded to the Trial Court.

II. Whether the scienter requirement of New Hampshire's obscenity statute as construed by the New Hampshire Supreme Court is plainly correct and does not pose a substantial federal question.

III. Whether the information under which Appellant is charged fairly informs it of the nature and cause of the accusation.

ARGUMENT

I. THIS COURT LACKS JURISDICTION WHERE, AS HERE, THE APPELLANT SEEKS REVIEW IN ADVANCE OF A CRIMINAL TRIAL.

Contrary to Appellant's claim, no substantial federal question is presented by the proceedings below dealing with the scienter requirement of New Hampshire's obscenity statute and the sufficiency of the indictment against Appellant. Where, as here, there is no final judgment by the Trial Court, this Court lacks jurisdiction to review this appeal. 28 U.S.C. §1257a. See: Berman v. United States, 302 U.S. 211, 212 (1937); Parr v. United States, 351 U.S. 513, 518 (1955). In this case, the State Supreme Court ruled on the sufficiency of the statute and the information in advance of trial. State v. Manchester News Company, Inc., 118 N.H. ____ (decided April 25, 1978) (attached hereto as Appendix A). Although the State Supreme Court remanded the case to the Trial Court, the trial has been delayed because of Appellant's appeal to this Court.

As a matter of sound judicial policy, this Court should decline to review this case where a constitutional issue is involved in that the proceedings below may moot the issue. For example, the Appellant may be found innocent at trial, it may plead guilty, or the prosecutor could dispose of the charge. In short, this case is not ripe for review by this Court.

II. THE SCIENTER REQUIREMENT OF NEW HAMPSHIRE'S OBSCENITY STATUTE, AS CONSTRUED BY THE NEW HAMPSHIRE SUPREME COURT, IS PLAINLY CORRECT AND DOES NOT POSE A SUBSTANTIAL FEDERAL QUESTION.

Appellant attacks N.H. RSA 650:1, II (Supp. 1976) on the ground that it does not require a showing of specific knowledge of the contents of the material in an obscenity prosecution. The State submits that the statutory scienter requirement, as construed by the New Hampshire Supreme Court in State v. Manchester News Company, Inc., supra, is clearly constitutional and poses no substantial federal question.

The statute at issue, RSA 650:2 (Supp. 1976) (amended by Laws 1977, 199:2), requires the prosecution to prove that the Appellant delivered the obscene material with knowledge of the nature of the contents. N.H. RSA 650:1, II (Supp. 1976) defines knowledge as a "general awareness of the nature of the content of the material." In Hamling v. United States, 418 U.S. 87 (1974), this

Court upheld a trial court's instruction that the defendant needed to have "knowledge of the character of the materials." This Court stated that "[it] is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Hamling, supra, at 123. This formulation of the scienter requirement was properly relied on by the New Hampshire Supreme Court in construing the statute at issue. The Court below stated:

> Having a general awareness of the nature of the contents of the material is, in our opinion, the same as being in some manner aware of the character of the material, and having knowledge of the nature, contents, or character of the material. It does not make a defendant absolutely liable, but liable only if he is aware of the nature of the material; the statute is therefore constitutional.

Although the Hamling statement of scienter uses the words "contents," "character" and "nature" with regard to the materials, they

are merely descriptive of the same standard. To view them as separate and distinct categories of constitutional dimension would conflict with this Court's holding in Hamling that "knowledge of the character of the materials" was a sufficient instruction to the jury on the question of scienter.

Appellant's claim that the Constitution demands a scienter standard of specific knowledge of the content of obscene material is unsupported by case law. Last term, appeals dealing with attacks on scienter requirements of obscenity statutes were docketed by this Court. However, certiorari was denied in the following cases: Sewell v. Georgia, Docket No. 76-1738 (dismissed for want of a substantial federal question) (April 24, 1978); Robinson v. Georgia, Docket No. 77-915 (judgment vacated) (June 24, 1978); Teal v. Georgia, Docket No. 77-790 (dismissed for want of a substantial federal question) (April 24, 1978); Sherwin v. United States, Docket No. 77-1196

(June 19, 1978); Cargal v. Georgia, Docket No. 77-142 (June 26, 1978); Ballew v. Georgia, Docket No. 77-1425 (June 12, 1978); International Amusements v. Utah, Docket No. 77-383 (June 9, 1978). No inference can be drawn from the above cases that a specific scienter test is constitutionally required. Rather, the criminal convictions in the above cases support the State's position that the states are free to impose their own formulation of scienter requirements in obscenity prosecutions.

In addition, Commonwealth v. Thureson, Mass. Adv. Sh. (1976) 2659, 357 N.E.2d 750, cited in Appellant's brief, is in complete accord with the New Hampshire standard of scienter. There, the Massachusetts Supreme Judicial Court addressed the scienter requirement set forth in Hamling, supra, as follows:

> In Hamling, the Court said, 418 U.S. at 123, 94 S. Ct. at 2910, "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents, of the ..

> materials he distributed, and that he knew the character and nature of the materials." With this language, the Court emphasized that knowledge of legal obscenity need not be shown. Rather, a "general awareness" of the materials' nature must be shown . . . " (emphasis added). 357 N.E.2d 750, at 752, footnote 1.

The above-underlined standard clearly comports with New Hampshire's standard of scienter, a "general awareness of the nature of the contents of the material."

Besides being consistent with Hamling, supra, and Thureson, supra, the New Hampshire scienter standard is clearly a reasonable exercise of state police power. As noted in Miller v. California, 418 U.S. 15, at 18 (1972), the State has a legitimate interest in proscribing pornography, provided it is of the "hardcore" type. Jenkins v. Georgia, 418 U.S. 152, 160-61 (1974). To make a specific awareness standard of constitutional dimension would, in effect, immunize from prosecution defendants who could claim that they didn't read the hardcore pornography

they sold or distributed, and therefore are innocent of any wrongdoing. Surely the New Hampshire Legislature properly avoided this absurd result by providing a standard of "general awareness."

III. THE INFORMATION UNDER WHICH APPELLANT IS CHARGED FAIRLY INFORMS IT OF THE NATURE AND CAUSE OF THE ACCUSATION.

In the first instance, this Court lacks jurisdiction over Appellant's claim where the information is challenged prior to any criminal trial, conviction and sentence. Berman, supra; Parr, supra; 28 U.S.C. §1257. Secondly, the information in the present case plainly comports with the constitutional standard of informing the Appellant the basis of the charge against it. As stated by the New Hampshire Supreme Court below, "an indictment or information will generally give sufficient notice to a defendant of a statutory offense when the charge follows the language of the statute and alleges all the necessary elements of the offense with sufficient specificity." Hamling v. United States, 418 U.S. 87, 117-118 (1974).

In the present instance, the Court below narrowed the statutory definition of obscenity to comport with constitutional standards.

Manchester News Company, Inc., supra (Appendix A). Thus, the Appellant is charged under an information governed by the constitutional standard of obscenity.

The charging portion of the information alleges that the Appellant:

> . . . on or about the 10th day of June 1976 at Manchester, New Hampshire, did purposely deliver obscene material to Luv Pharmacy, Inc., in that the said Defendant did distribute the July 1976 issue of Penthouse Magazine to the said Luv Pharmacy, Inc., the Defendant being a corporation, with knowledge of the nature of the contents thereof, contrary to RSA 650:2 . . . . (See: Appendix B for the text of the information).

The information describes the offense of obscenity in the language of N.H. RSA 650:2.[1]

The material elements of the offense charged are included: scienter and delivery

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1. N.H. RSA 650:2 provides in pertinent part as follows:

> I. A person is guilty of a misdemeanor if he commits obscenity when, with knowledge of the nature of the contents thereof, he:
> (a) . . . delivers . . . any obscene materials, . . .

of obscene material. The overt act designates the particular time and place that the Appellant distributed a specific issue of Penthouse Magazine to a New Hampshire retailer. The Appellant is a corporation engaged in the business of magazine distribution. Clearly, the information provides it with sufficient notice of what it is charged with and what it has to meet at trial.

In sum, the information is plainly and clearly constitutional and does not pose a substantial federal question to warrant review by this Court.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this case depends are so insubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the case by the Supreme Court of New Hampshire.

Respectfully submitted,

The State of New Hampshire

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Appendix A.

NOTICE: This opinion is subject to formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any typographical or other formal errors, in order that corrections may be made before the opinion goes to press.

Hillsborough
No. 7894

THE STATE OF NEW HAMPSHIRE
v.
MANCHESTER NEWS COMPANY, INC.

April 25, 1978

David H. Souter, attorney general, *Mr. Richard B. Michaud,* attorney(*Peter L. Heed,* assistant attorney general, orally), for the State.

Sheehan, Phinney, Bass & Green P.A., of Manchester (*W. Michael Dunn* orally), for the defendant.

BOIS, J. Manchester News Company, Inc., of Bedford, New Hampshire, is a corporation engaged in the business of distributing periodicals to local dealerships in New Hampshire. In September 1976, an indictment was returned by the grand jury alleging that the defendant delivered the July 1976 issue of *Penthouse* to LUV Pharmacy, Inc. and that this issue of *Penthouse* was obscene. The defendant moved to dismiss the indictment on various grounds, including the ground that no criminal knowledge on the part of the defendant was alleged. The State subsequently substituted an information for the indictment, charging the defendant with the same offense and adding the language "with knowledge of the nature of the contents [of the magazine], con-

trary to RSA 650:2 . . . ." The information was allowed by the court over defendant's objection and the motion to dismiss was deemed by the court to be applicable to the information.

After arguments on the defendant's motion to dismiss, the Suprerior Court (*Keller*, J.) denied the motion. All questions of law raised by the pleadings, rulings, and exceptions were reserved and transferred.

The defendant raises three issues: (1) whether the information describes the alleged offense with sufficient definiteness, (2) whether RSA ch. 650 (Supp. 1976) violates the United States Constitution, and (3) whether the legislature intended this type of defendant to be prosecuted under RSA ch. 650 (Supp. 1976).

I. The Indictment Issue

In order to be guilty of distributing obscene material under RSA 650:2 (Supp. 1976), a defendant need not have had knowledge that the material was obscene, but must be shown to have had knowledge of the nature of the contents thereof. *Hamling v. United States,* 418 U.S. 87 (1974). The defendant contends that the information defectively alleges the knowledge element of the offense because it does not specify how or when the defendant received knowledge of the contents of the July 1976 issue of *Penthouse,* or which agent of the corporation possessed the requisite knowledge. This, the defendant claims, is a violation of part I, article 15 of the New Hampshire Constitution, which provides: "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him . . . ."

An indictment or information "must inform the defendant of the offense for which he is charged with sufficient specificity so that he knows what he must be prepared to

meet and so that he is protected from being twice put in jeopardy." *State v. Bean,* 117 N.H. , , 371 A.2d 1152, 1154 (1977); *State v. Inselburg,* 114 N.H. 824, 827, 330 A.2d 457, 459 (1974). An indictment or information will generally give sufficient notice to the defendant of a statutory offense when the charge follows the language of the statute and alleges all the necessary elements of the offense with sufficient specificity. *Hamling v. United States,* 418 U.S. 87, 117-18 (1974); *State v. Bean supra; State v. Inselburg, supra;* 2 Wharton, Criminal Procedure § 289 (12th ed. 1975). Every fact the State intends to prove, however, does not have to be pleaded in the information. The test is not whether the information could be more comprehensive and certain. To the contrary, the information need contain only the elements of the offense and enough facts to warn the accused of the specific charges against him. The information in this case sufficiently apprised the defendant that he was being charged with having knowledge of the contents of a certain magazine. It was not necessary for the State to allege how or when the defendant acquired this knowledge.

It was also not necessary for the information to state which agent of the corporate defendant possessed knowledge of the magazine's contents. An information charging a corporation with an offense need not indicate for whose acts the corporation is being charged. *See United States v. Van Allen,* 28 F.R.D. 329 (1961 S.D.N.Y.); *United States v. Detroit Sheet Metal & Roofing C. Ass'n,* 116 F. Supp. 81 (E.D. Mich. 1953); *State v. Oregon City Elks Lodge No. 1189, BPO Elks,* 17 Or. App. 124, 520 P.2d 900 (1974).

The defendant's second challenge to the sufficiency of the information concerns the use of the phrase "obscene material." The defendant would have the State allege exactly why the magazine is obscene. It contends that the information should allege facts from which the obscenity of the

magazine in issue could be found. This argument was considered by the United States Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974). In *Hamling* the defendants were charged, inter alia, with mailing obscene material in violation off 18 U.S.C. § 1461. The Court recognized that the definition of obscenity is not a question of fact, but one of law. The word "obscene" is not merely a descriptive term, but a legal term of art. The legal definition of obscenity does not change with each indictment; it is a term "sufficiently definite in legal meaning to give a defendant notice of the charge against him." *Hamling v. United States*, 418 U.S. at 118; *see Roth v. United States*, 354 U.S. 476 (1957). Because obscenity is sufficiently definite in legal meaning to give a defendant notice of the charge against him, no facts have to be alleged in the indictment or information that would support a finding of obscenity. We therefore hold that the information in this case is sufficient to inform the defendant of the charge against it.

II. The Obscenity Statute Issue

A.

The thrust of defendant's argument concerning the constitutionality of the New Hampshire obscenity statute, RSA ch. 650 (Supp. 1976), is that it regulates expression protected under the United States Supreme Court decision in *Miller v. California*, 413 U.S. 15 (1973).

The United States Supreme Court in *Miller v. California supra* established the basic guidelines for distinguishing between material protected by the first and fourteenth amendments, and unprotected obscene material. The oft-repeated three-prong test of *Miller* is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . .

> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

The Court attempted to establish a test for isolating descriptions or depictions of patently offensive hard-core sexual conduct. *Miller v. California, supra* at 27; *see State v. Harding*, 114 N.H. 335, 339, 320 A.2d 646, 649 (1974). The State must specifically define or describe the sexual conduct which it wishes to regulate in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California, id.* at 27. The Court also intended to place a limitation on the types of sexual conduct a State may regulate. While not limiting States to these examples, the Court said that "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . [and] (b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals" were the types of hard-core sexual conduct which the States could regulate. *Miller v. California, supra* at 25.

Cases after *Miller* make it clear that part (b) of the *Miller* test and the examples given by the Court were intended to be a substantive limitation on the sexual conduct a State may list in its statute. In *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974), the Court said that the examples given in *Miller* were "certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination [of obscenity]. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even

though a properly charged jury unanimously agreed on a verdict of guilty." The Court reiterated this position in *Hamling v. United States,* 418 U.S. 87, 114 (1974): "*Miller* . . . was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. . . . [T]here is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." The Court has referred to this substantive limitation in recent obscenity opinions. *See Ward v. Illinois,* 431 U.S. 767 (1977); *Smith v. United States,* 431 U.S. 291 (1977).

The question therefore becomes whether the legislature exceeded this substantive constitutional limitation in RSA 650:1 VI (Supp. 1976). This section defines sexual conduct as:

> [H]uman masturbation, sexual intercourse actual or simulated, normal or perverted, *or any touching of the genitals, public areas or buttocks of the human male or female, or the breasts of the female,* whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship . . . . (Emphasis added).

It is the emphasized portion of the above statute which is troublesome. The kinds of sexual conduct therein specified by the legislature are certainly not as tame as the bare midriff example of Mr. Justice Rehnquist in *Jenkins v. Georgia,* 418 U.S. 153, 161 (1974). However, they are certainly not as "hard core" as the examples given in *Miller* and emphasized in *Jenkins* and *Hamling,* or the categories of sexual conduct we enumerated in *State v. Harding,* 114

N.H. 335, 341, 320 A.2d 646, 651 (1974). Such a broad sweep by the legislature can create a chilling effect on protected expression, which is what the *Miller* court wanted to avoid.

We must therefore hold the above-emphasized portion of RSA 650:1 VI (Supp. 1976) as violative of the first and fourteenth amendments of the United States Constitution, and those listed sexual activities must be read out of that section.

B.

Defendant also attacks the statute on the ground that it does not specify the requisite scienter for a conviction. RSA 650:2 (Supp. 1976) (amended by Laws 1977, 199:2) requires that the defendant deliver the obscene material with knowledge of the nature of the contents, and RSA 650:1 II (Supp. 1976) defines knowledge as a "general awareness of the nature of the content of the material." The defendant claims this is defective under *Hamling v. United States,* 418 U.S. 87 (1974), because it does not require *specific* knowledge of the contents of the material.

Defendant cannot seriously be contending that the distributor of an obscene magazine must be shown to have known of every detail of the magazine before he may be convicted. On the other hand, no one can contend that a distributor may be convicted without any requirement of scienter. *Smith v. California,* 361 U.S. 147 (1959). The amorphous area between these extremes is at issue, but to us this issue is more of semantics than substance.

In *Mishkin v. State of New York,* 383 U.S. 502 (1966), the United States Supreme Court validated the New York Court of Appeals' interpretation that its statute requires the defendant to be "in some manner aware of the character of the material." The Supreme Court made reference to *Mishkin* in *Hamling,* in which it upheld the trial court's jury

instruction that defendant needed to have "knowledge of the character of the materials." The Court said that "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling v. United States, supra* at 123. In light of the definitions of scienter to which the Supreme Court has given approval, we cannot say RSA 650:1 II (Supp. 1976) is unconstitutional. Having a general awareness of the nature of the contents of the material is, in our opinion, the same as being in some manner aware of the character of the material, and having knowledge of the nature, contents, or character of the material. It does not make a defendant absolutely liable, but liable only if he is aware of the nature of the material; the statute is therefore constitutional.

III. The Legislative Intent Issue

The defendant claims that the prosecution of a distributor corporation is contrary to the following expression of legislative intent:

> It is the express intent of the general court that . . . RSA 650 . . . apply only to those persons actually responsible for the production and dissemination of pornographic or obscene materials. Laws 1976, 46.6.

The defendant theorizes that the legislature intended the statute to apply only to the producer of the material, and not to the mere distributor of obscene material. We cannot agree with the defendant.

The language of RSA 650:2 (Supp. 1976) (amended by Laws 1977, 199:2) manifests the legislature's intent to attach criminal liability to more than just the person or corporation responsible for the decision to produce the

obscene material. The legislature clearly intended to include those individuals and corporations in the chain of distribution. This is indicated by the language of RSA 650:2 (Supp. 1976): "[S]ells, delivers or provides, or offers or agrees to sell, deliver or provide, . . . otherwise makes available any obscene material; . . . possesses any obscene material for the purpose of sale or other commercial dissemination . . . ." RSA 650:1 I (Supp. 1976) includes in the definition of "disseminate" the terms "distribute" and "sell." The legislature would not have used this language if it intended to exclude distributors of obscene material. We hold that the defendant is within the scope of the statute.

We therefore remand for further proceedings consistent with our construction of RSA ch. 650 (Supp. 1976).

Exceptions sustained in part; remanded.

LAMPRON, J., did not sit; the others concurred.

APPENDIX B

(COPY OF INFORMATION ENTERED AT THE APRIL TERM, 1977, HILLSBOROUGH COUNTY SUPERIOR COURT)

At the Superior Court holden at Manchester within and for the County aforesaid on the 1st Tuesday of April, 1977, be it remembered that Robert L. Elliott, Esq., Assistant County Attorney, being here in Court to understand that Manchester News Co., Inc., of Bedford, New Hampshire, on or about the 10th day of June 1976 at Manchester, New Hampshire, did purposely deliver obscene material to Luv Pharmacy, Inc., in that the said defendant did distribute the July 1976 issue of Penthouse Magazine to the said Luv Pharmacy, Inc., the defendant being a corporation, with knowledge of the nature of the contents thereof, contrary to RSA 650:2 against the peace and dignity of the State.